

People's China and the Law of the Sea

In recent years the Chinese have become increasingly interested in questions concerning the territorial sea, zones of special jurisdiction, the high seas, the continental shelf and the deep sea-bed. The purpose of this article is to describe their positions on a number of such issues, comment on their differences with other states, and analyze their motivations and goals. As an emerging world power and a country of considerable influence already, it is important that China's views be known, understood and considered. Hopefully, this article will contribute to that effort.

Territorial Sea

Definition

In Paragraph 1(1) of a working paper on the sea area within the limits of national jurisdiction (hereinafter working paper I) that was submitted to the Second Subcommittee of the United Nations Sea-Bed Committee, the Chinese Government defined a state's territorial sea as "a specified area of sea adjacent to its coast or internal water including the air space over the territorial sea and its bed and subsoil thereof, over which it exercises sovereignty."¹ This description is in accord with Section I of the Convention on the Territorial Sea and the Contiguous Zone and with generally accepted usage.

Breadth

It has long been the Chinese position that the important question of the breadth of a state's territorial sea should be decided by that state's own government subject to the requirements of reasonableness and need.² This

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¹U.N. Doc. A/AC. 138/SC II/L.34 (1973); also found in the Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 1973, Vol. III, 28th Sess., Supp. no. 21 (A/9021) at 71.

²"The breadth of the territorial sea of the various countries should be decided, within reasonable scope, in accordance with the respective needs of those countries. . . . Theoretically speaking, since the international law recognizes that territorial sea should be under the sovereignty of the coastal country, the right to enact a reasonably broad territorial sea and the method of measuring it should

attitude was clearly enunciated by An Chih-yuan in China's maiden speech before the United Nations Sea-Bed Committee on March 3, 1972³ and was reaffirmed by Shen Wei-liang in a presentation to that same body in Geneva on July 19, 1973.⁴ The most recent formulation of this viewpoint was put forward in Paragraph 1(1) of working paper I which provided that:

A coastal state is entitled to reasonably define the breadth and limits of its territorial sea according to its geographical features and its needs of economic development and national security and having due regard to the legitimate interests of its neighboring countries and the convenience of international navigation, and shall give publicity thereto.⁵

Since the Chinese would allow each state to set the boundaries of its own territorial sea, they obviously do not believe there is any logic or virtue in uniformity and reciprocity in this area. For them, it is perfectly acceptable that some governments claim expansive jurisdiction while others are more modest in their assertions of sovereignty. But it does appear that the Chinese would favor certain absolute limits on the extent of the territorial sea. Paragraph 2(1) of working paper I dealt with the creation of exclusive economic zones beyond and adjacent to the territorial sea of coastal states. There it was stipulated that "The outer limit of the economic zone may not, in maximum, exceed 200 nautical miles measured from the baseline of the territorial sea."⁶ By implication therefore the territorial sea itself could not be greater than 200 nautical miles.

As to delimitation where the territorial seas of different countries would otherwise overlap, the Chinese draft provides that coastal states in the same region may define their own uniform limit⁷ and that states which are opposite or adjacent to each other shall determine their mutual boundaries by agreement.⁸

naturally belong to this country. Practically speaking the breadth of the territorial sea of the various countries of the world has always been decided by the respective countries." *Fu Chu, Kuan-yu wo-kuo ti ling-hai wen t'i* (Concerning the Question of Our Country's Territorial Sea) (1959), quoted in 1 COHEN AND CHIU, EDS., *PEOPLE'S CHINA AND INTERNATIONAL LAW* 472 (1974).

³"We hold that it is within each country's sovereignty to decide the scope of its rights over territorial seas. All coastal countries are entitled to determine reasonably the limits of their territorial seas and jurisdiction according to their geographical conditions, taking into account the needs of their security and national economic interests and having regard for the requirement that countries situated on the same seas shall define the boundary between their territorial seas on the basis of equality and reciprocity." U.N. Doc. A/AC. 138/SR. 72 (1972); also found in 11 I.L.M. 654 (1972).

⁴"... all coastal states are entitled to reasonably determine the breadth of their own territorial seas according to their own specific conditions. To put it in a concrete way, a coastal state, in determining the breadth of its territorial sea, will consider its own geographical conditions and the needs of safeguarding its own security, and also take into account the legitimate interests of neighboring states and the convenience of international navigation." "Developing Countries, Small and Medium-Sized Countries Oppose Maritime Hegemonism at U.N. Sea-Bed Meetings," NCNA-English, Geneva (July 19, 1973) in S.C.M.P. 73-31:66 at 69.

⁵*Supra*, note 1; ¶ 1(5) goes on to state, "The breadth and limits of the territorial sea as defined by a coastal State are, in principle, applicable to the islands belonging to that State."

⁶*Id.*

⁷Paragraph 1(3) provides, "Coastal States in the same region may, through consultations on an equal footing, define a uniform breadth or a limit for the territorial sea in the region." *Supra*, note 1.

⁸Paragraph 1(4) provides, "Coastal States adjacent or opposite to each other shall define the

The Chinese Government has voiced strong backing for those states which have sought to extend their jurisdiction over surrounding waters. In 1957, they came to the defense of Indonesia when that country announced its intention to establish a 12 mile limit using straight baselines and in 1958 they expressed similar support for Iceland's right to enlarge its territorial sea.⁹

The Chinese Government has also given its wholehearted approval and encouragement to the efforts of the Latin American states to claim broad rights. As An Chih-yuan declared in his March 3, 1972 speech to the United Nations Sea-Bed Committee, "We firmly support the just struggle initiated by Latin American countries in defense of the 200 nautical-mile territorial sea rights and their own marine resources, and resolutely oppose the maritime hegemony and power politics of the superpowers."¹⁰ It might just be noted however, in line with what was said previously, that the Chinese have refrained from backing the few extravagant assertions of a territorial sea greater than 200 nautical miles.

The Chinese Government has been alert to any attempt by the United States or the Soviet Union to limit a state's freedom unilaterally to extend its territorial sea as far as 200 nautical miles. They charge that the two superpowers are in collusion to impose their will on the rest of the world¹¹ in order to serve their economic¹² and military¹³ interests. No opportunity to denounce the United States and the Soviet Union is passed up and no action they might take is

boundaries between their territorial seas on the principles of mutual respect for sovereignty and territorial integrity, equality and reciprocity." *Id.*

⁹*Supra*, n. 2 at 469. See: Commentator, *Sovereignty over Territorial Waters and "Freedom of the Seas,"* J.M.J.P. (Dec. 28, 1957) at 5; Commentator, *Do Not Permit Interference with Iceland's Right to Decide the Scope of its Territorial Sea,* J.M.J.P. (Sept. 3, 1958) at 4.

¹⁰*Supra*, note 3.

¹¹"What is most ridiculous is when a superpower says 3 nautical miles today others must not say no; when tomorrow it, in collusion with the other superpower, says the breadth must not exceed 12 nautical miles, others have again to follow suit. By this logic, only the superpowers have the final say, while the other one hundred and scores of countries in the world can only submissively obey and let themselves be trampled upon at will. Can this be 'international law'? It is a crude violation of the principle of state sovereignty. It is imperialist logic, pure and simple." *Id.*

¹²"At the Sea-Bed Convention, a most acute struggle was unfolded in connection with the list and the question of the exploitation of marine resources. Playing the bully and running amuck on the seas and oceans, the one or two superpowers totally disregarded the sovereignty of other countries. They arbitrarily insisted on restricting the limit of the territorial sea and areas under the jurisdiction of other countries, adamantly protecting the old regime of the law of the sea which serves the interests of imperialism." "Chen Chu's Speech at U.N. General Assembly First Committee on Law of Sea Conference," NCNA-English, U.N. (Dec. 4, 1972) in S.C.M.P. 72-50:179.

¹³As Shen Wei-liang pointed out, "At the 1958 Conference on the Law of the Sea, the head of the delegation of a superpower attempted to impose upon other countries the three-nautical-mile breadth of the territorial sea as a so-called principle of international law. But after the conference he publicly admitted that he was opposed to a broader territorial sea not 'simply' from consideration of international law, but 'for compelling military and commercial reasons'; because, if a broader territorial sea was agreed on, the operations of the air and naval forces of his country would be 'seriously impeded.'" "Chinese Representative Speaks at Sub-Committee of U.N. Sea-Bed Committee," *Hsinhua Weekly*, no. 15 (April 9, 1973), quoted in COHEN AND CHIU, *supra*, note 2 at 495.

immune to suspicion of ulterior purposes.¹⁴ The Chinese respond to the argument that the larger the territorial sea the smaller the open sea by saying that, "The so-called open sea has in fact always been the 'private sea' of a few strong naval powers"¹⁵ and that the real interests of the small and medium sized countries lie in the exploitation of the waters off their coasts rather than in unhindered freedom of navigation and the maximization of the area to be subject to a proposed international régime.

The Chinese Claim

The Chinese Government itself claims a territorial sea of 12 nautical miles. This was spelled out in a Declaration of September 4, 1958 which provided in Paragraph (1) that:

The breadth of the territorial sea of the People's Republic of China shall be 12 nautical miles. This provision applies to all the territories of the People's Republic of China, including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghue Islands, the Tungsha Islands, the Hsisha Islands, the Chungsha Islands, the Nansha Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas.¹⁶

There were a number of reasons for the timing and substance of the decision. First, no agreement had been reached on the width of the territorial sea at the United Nations Conference on the Law of the Sea at Geneva in April 1958 (to which China had not been invited) and the Chinese apparently sensed a movement away from the traditional 3 mile rule. Second, the Soviet Union came out in favor of a 12 mile limit at the Conference and at that time the Russians had a great deal of influence on their socialist colleagues.¹⁷ Third, there had been public discussion of the issue in the press in late 1957 and early 1958 as the Chinese became aware of their interests and potential in maritime affairs¹⁸ and became more active in world politics generally. Fourth, the most compelling factor was the 1958 crisis over Quemoy and Matsu. The Chinese had begun intensive shelling of the offshore islands on August 23, 1958. Secretary of State Dulles pledged the United States to the defense of Quemoy and Matsu under the mutual security pact with Taiwan on September 4, 1958 and the Seventh Fleet began nighttime convoy escorts of Nationalist ships to the beleaguered islands.¹⁹ On the same day, the Chinese issued their Declaration on the

¹⁴For example, the stipulation in the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other weapons of mass destruction on the Seabed and the Ocean Floor and in the subsoil thereof that the area within 12 nautical miles of the coast should be exempted was seen by the Chinese as a machination "to push their views on restricting the territorial waters of a country within 12 nautical miles." 14 P.R. 10:22 (March 5, 1971).

¹⁵"Speech by Chiao Kuan-hua, Chairman of the Delegation of the People's Republic of China, at the Plenary Meeting of the 28th Session of the U.N. General Assembly (Oct. 2, 1973)," 20 (1973).

¹⁶"Declaration of Chinese Government on China's Territorial Sea," NCNA-English, Peking (Sept. 4, 1958) in S.C.M.P. no. 1849.

¹⁷HSIUNG, LAW AND POLICY IN CHINA'S FOREIGN RELATIONS 103 (1971).

¹⁸Cheng Tao, *Communist China and the Law of the Sea*, 63 A.J.I.L. 47 at 52 (Jan. 1969).

¹⁹*Supra*, note 17 at 103-104.

territorial sea which put Quemoy and Matsu within their internal waters through use of the straight baseline method of delimitation.²⁰ The United States and Britain immediately rejected the new claim while support was voiced by the Soviet Union, East Germany, Rumania and Indonesia among others.²¹ On September 7, 1958 United States warships accompanied Nationalist supply ships in daylight to a distance of three miles off Quemoy. The Chinese responded with a serious warning.²²

The Chinese have employed a number of legal arguments to justify their claim to a territorial sea of 12 nautical miles. First, they assert that a state may, in the exercise of its sovereignty, establish its own territorial boundaries and that this determination may not be challenged by others. Second, they conclude that there never has been a generally accepted limit on the breadth of the territorial sea and that each state therefore is free to act as it sees fit. Third, they say that even if three miles was once the rule, it has now become obsolete because of new political and technological conditions.²³ While each of these points may be plausible, they were all advanced after the fact to legitimate a decision made primarily for reasons of security.²⁴

The Chinese Government has chosen to use the straight baseline method of delimiting the breadth of the territorial sea.²⁵ Legal commentators as well as officials²⁶ were strongly influenced by the precedent of the Anglo-Norwegian Fisheries Case and by the military advantages of this technique. The Chinese therefore felt it appropriate to employ the method themselves and are quite tolerant of its use by others.

Straits

The Declaration of September 4, 1958 altered the status of Chiungchou Strait. This strait separates Leichow Peninsula from Hainan Island and connects the South China Sea with the Gulf of Tonkin. It is about 50 miles long and between 9.8 and 19 miles wide. By using straight base-lines, the Chiungchou Strait became internal waters and was specifically so designated.²⁷

²⁰Paragraph (2) provided, "China's territorial sea along the mainland and its coastal islands takes its base line comprising straight lines connecting base points on the mainland coast and those on the coastal islands on the outer fringe, and the water area extending 12 nautical miles outward from the base line is China's territorial sea. The water areas inside the base line, including the Pohai Bay and the Chiungchow Straits, are Chinese inland waters. The islands inside the base line, including the Tungyin Island, the Kaoteng Island, the Matsu Islands, the Paichuan Islands, the Wuchiu Island, the greater and lesser Quemoy Islands, the Tatan Island, the Erhtan Island, are islands of the Chinese inland waters." *Supra*, n. 16.

²¹*Supra*, note 18 at 53-54; *supra*, n. 16 at 104.

²²*Supra*, note 18 at 54.

²³*Id.*, 54-6.

²⁴For an examination of the strides made by the Chinese Navy in the field of coastal defense, see Dewenter, *China Afloat*, 50 *FOR. AFF.* 738 (July 1972) at 747.

²⁵See note 20, *supra*.

²⁶E.g., Wei Wen-han and Fu Chu; see note 2, *supra*, at 468, 485.

²⁷See note 20, *supra*.

The purpose of this change was apparently to make impossible any claim to a right of innocent passage.²⁸ By an Order of the State Council of the Chinese People's Republic adopted on June 5, 1964, regulations were promulgated governing the passage of vessels through the Strait.²⁹ Foreign warships are forbidden to use the waterway. Foreign merchantmen, however, may use the Strait if they comply with the prescribed traffic and security rules.

The Chinese have discussed the question of straits in the public press and at the United Nations. They generally support coastal state discretion to dominate such routes as internal waters or territorial sea and to enact appropriate controls. As readers of the *People's Daily* were informed, "If a strait is entirely located within the baseline of the territorial sea of a state, it is an internal sea of that state."³⁰ The Chinese presumably believe that all foreign ships could be prohibited from using such waters though of course they themselves have allowed merchantmen to continue to pass through Chiungchou Strait. As for straits which a coastal state has chosen to include in its territorial sea, Shen Wei-liang told the United Nations Sea-Bed Committee meeting in Geneva that:

Everybody understands that territorial seas are different from the high seas. Every state in the world has the right to define the extent of its territorial seas, and that is its sovereign right. Even if straits within the territorial seas of coastal states are often used for international navigation, this fact does not change their status of territorial seas into that of high seas.³¹

He went on to declare that there could be innocent passage through such waters in conformance with regulations but not free passage. In line with this position, the Chinese have opposed all attempts to internationalize certain straits such as the Strait of Malacca.³² And they have stated explicitly in

²⁸Though China is not a party, Article 5(2) of the Convention on the Territorial Sea and the Contiguous Zone provides that, "Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters." And art. 16(4) declares that, "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." U.N. Doc. A/CONF. 13/L. 52 (1958).

²⁹LAY, CHURCHILL AND NORDQUIST, *NEW DIRECTIONS IN THE LAW OF THE SEA: DOCUMENTS* 549 (1973).

³⁰J.M.J.P. (April 12, 1972) at 6.

³¹"Chinese Representative Speaks at UN Sea-Bed Committee on Passage Through Straits," NCNA-English, Geneva (July 24, 1972) in S.C.M.P. 72-31:222.

³²An article in Peking Review coupled this attitude with a general attack on the Soviet Union. "In collusion with the reactionary Sato government of Japan, the Soviet government recently raised the absurd idea that the Strait of Malacca should be internationalized. . . . This conspiracy is opposed by the governments of Malaysia and Indonesia. . . . It is no accident that Soviet revisionist social imperialism in casting a covetous eye on the Strait of Malacca, the main passage between the Indian Ocean and the South China Sea. . . . Of late quite a number of Soviet warships have entered the Indian Ocean through the Strait of Malacca and carried out activities which have seriously threatened the security of all countries in that area." "Malaysia and Indonesia Oppose Soviet Government's Conspiracy," 15 P.R. 11:20-1 (March 17, 1972).

Paragraph 1(7) of working paper I that, "A strait lying within the territorial sea, whether or not it is frequently used for international navigation, forms an inseparable part of the territorial sea of the coastal State."³³ While holding strong views on the subject, the Chinese have declared their willingness to cooperate with their colleagues on the Second Subcommittee of the United Nations Sea-Bed Committee to achieve "a reasonable solution of the question of navigation through straits."³⁴

Bays

The Declaration of September 4, 1958 expressly stated that Pohai Bay (Gulf of Chihli) is part of the internal waters of China.³⁵ Pohai Bay is a large body of water which lies between the provinces of Liaoning, Hopeh and Shantung and the Yellow Sea. It is approximately 300 miles long and 180 miles wide. The mouth is about 45 miles across although there is a string of islands which cut the entrance into a series of openings, the largest of which measures 22.5 miles. The Bay is important to the security of China since it fronts on many of the industrial centers of the country and is not far from the inland city of Peking.

The Chinese have used a variety of legal arguments to justify their claim that Pohai Bay is internal waters. First, they state that since China claims a territorial sea of 12 miles and since the largest opening between islands at the entrance is 22.5 miles, the entrance is effectively closed off by territorial sea.³⁶ Second, they assert that they are entitled to use straight base-lines to delimit the territorial sea and that the application of this method to the coast in that area results in Pohai Bay being internal waters. Third, they maintain that in any event Pohai Bay is an "historic bay" and is therefore under exclusive Chinese jurisdiction.³⁷ Because of one or another of these arguments, there has not been any significant protest made to this claim of the Chinese Government in regard to Pohai Bay. It seems clear that the Bay is generally considered to be a part of the internal waters of China.

Islands

The Declaration of September 4, 1958 specifically stated that Taiwan and other islands belonging to China were separated from the mainland by high seas.³⁸ No attempt was made to use straight baselines under Paragraph (2)³⁹ in

³³*Supra*, note 1.

³⁴"Chinese Delegate [Chuang Yen] Refutes Soviet Revisionist Delegate's Absurd Assertions at UN Sea-Bed Committee Meeting," NCNA-English, U.N. (April 5, 1973) in S.C.M.P. 73-16:111 at 114.

³⁵See note 20, *supra*.

³⁶*Cf.*, art. 7(4) of the Convention on the Territorial Sea and the Contiguous Zone, *supra*, note 28, which provides, "Where the distance between the low water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low water marks, and the waters enclosed thereby shall be considered as internal waters."

³⁷Fu Chu in COHEN AND CHIU, *supra*, note 2 at 482-4; *supra*, note 18 at 60-1.

³⁸See *supra*, text at note 16

³⁹See note 20, *supra*.

order to claim the area between Taiwan and the coast as territorial sea. Rather, the rule followed, as explained by Fu Chu, was that:

If the breadth of the strait is wider than twice the breadth of the territorial sea declared by the coastal state, then the area outside the territorial sea should be open sea. There are many straits belonging to this category, and the Taiwan Strait also conforms to this situation.⁴⁰

The Chinese coastal islands however were brought within internal waters by the use of straight base-lines.

The Chinese are quite tolerant of claims made by archipelago states like Indonesia⁴¹ which seek to encompass greater sea areas under their exclusive jurisdiction through the liberal use of straight base-lines. In working paper I, The Chinese delegation to the United Nations Sea-Bed Committee suggested in Paragraph 1(6) that, "An archipelago or an island chain consisting of islands close to each other may be taken as an integral whole in defining the limits of the territorial sea around it."⁴² It should be noted that while this provision might be considered permissive in that it allows a state to decide for itself whether it will adopt a method that will result in cordoning off large areas as internal waters or territorial sea, it does impose a requirement of moderation by referring specifically to "islands close to each other." This is very typical of the general Chinese approach which is to accord maximum deference to sovereign state action subject only to the tests of necessity and reasonableness.

Innocent Passage

The question of innocent passage has already been adverted to in connection with the passage of foreign ships through straits. It is obvious that the Chinese Government takes a severely restrictive view of this right of navigation. Article 14(1) of the Convention on the Territorial Sea and the Contiguous implies a right of innocent passage for both warships and merchantmen.⁴³ This provision was strongly condemned by Shen Wei-liang in a speech to the Second Subcommittee of the United Nations Sea-Bed Committee.⁴⁴

⁴⁰Fu Chu in COHEN AND CHIU, *supra*, note 2 at 486.

⁴¹See note 9, *supra*.

⁴²*Supra*, note 1.

⁴³Art. 14(1) of the Convention, *supra*, note 28, which appears under §II, Right of Innocent Passage, §A. Rules applicable to All Ships, reads as follows: "Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea."

⁴⁴"Article 14 of the aforementioned convention provides in general terms that ships of all states shall enjoy the right of innocent passage through territorial seas. That is to say, it may be interpreted that foreign military ships enjoy the same right. This is obviously unacceptable to many countries. As is well known, legislations [sic] of many countries expressly provide that prior approval or notice is imperative for foreign military ships to pass through their territorial seas. This is a matter within the sovereignty of a coastal state—a point even admitted by the draft convention originally put forward by the international law commission. However, the above mentioned article in the convention has actually written off at one stroke this lawful right of coastal states." *Supra*, note 13.

The Chinese position was stated in Paragraph (3) of the Declaration of September 4, 1958:

No foreign vessels for military use and no foreign aircraft may enter the Chinese territorial sea and the airspace above it without the permission of the Government of the People's Republic of China. Any foreign vessel while navigating the Chinese territorial sea must observe the relevant laws and regulations laid down by the Government of the People's Republic of China.⁴⁵

A number of conclusions can be drawn from this pronouncement. First, the Chinese recognize no right of innocent passage for foreign warships. Such vessels may, however, pass through territorial seas after having first obtained permission from the coastal state. This view is at variance with the Geneva Convention as already noted. Second, there is no right of innocent passage for foreign military or civil air craft in the airspace above the territorial sea. This prohibition is in conformity with a number of international air conventions and reflects the generally accepted opinion that aircraft pose a greater potential threat than ships to the security of the coastal state and also that traffic control requires advance notice and permission to proceed. Third, as to foreign merchant ships, "the Chinese Declaration appears to assert complete discretion to enact laws and regulations regarding the right of innocent passage, while the Geneva Convention requires such laws and regulations to be in conformity with its provisions and other rules of international law."⁴⁶ This strictness is a matter of degree rather than of kind since any coastal state would expect ships using its territorial sea to observe its law. In sum, it is the denial of innocent passage to warships and the requirement of advance permission that is striking about the Chinese position rather than the regulation of foreign merchantmen. Their extreme cautiousness is no doubt due to a history of gunboat diplomacy and a present sense of military insecurity.

The Chinese have recently consolidated their position on the question of innocent passage and have expressed their views in Paragraph 1(8) of working paper I. The new formulation declares:

A coastal State may, for the purpose of regulation of its territorial sea, enact necessary laws and regulations and give publicity thereto. Ships and aircraft of a foreign State, passing through the territorial sea and the air space thereabove of another State, shall comply with the laws and regulations of the latter State.

This paragraph would seem to imply that foreign merchantmen and civil aircraft should be able to pass through the territorial sea and airspace above without the necessity of obtaining prior permission as long as they abide by the rules enacted by the coastal state. The provision goes on to say, "Foreign non-military ships enjoy innocent passage through territorial seas. Passage is

⁴⁵*Supra*, note 16.

⁴⁶*Supra*, note 18 at 63; see Convention on the Territorial Sea and the Contiguous Zone, *supra*, note 28, art. 17.

innocent when it is not prejudicial to the peace, security and good order of a coastal state." This is unexceptionable. The paragraph concludes, "A coastal State may, in accordance with its laws and regulations, require military ships of foreign States to tender prior notification to, or seek prior approval from its competent authorities before passing through its territorial sea."⁴⁷ This of course is a reassertion of the Chinese position that foreign warships have no right of innocent passage but that they may be granted permission to use the territorial sea as an accommodation by the coastal state. In sum, there has not been very much change in the attitudes or motivations of the Chinese Government since their original Declaration of September 4, 1958.

Scientific Research

Closely related to the issue of innocent passage is the question of scientific research in territorial waters. The Chinese have been extremely suspicious of oceanographic vessels and have tended to equate them with espionage and military activities and with economic exploitation.⁴⁸ Wang Teh-chao stressed in a speech to the United Nations Sea-Bed Committee that, "Marine scientific research within the limits of national jurisdiction of a coastal state can only be conducted with the approval of the coastal state beforehand, and, relevant laws and provisions of the coastal state should be observed."⁴⁹ At the current time the debate rages between those who favor freedom of research and those like China,⁵⁰ Canada, Brazil, Ecuador, El Salvador, Panama, Peru and Uruguay who would require coastal state consent. The issue is one on which the Chinese can comfortably line up with the poor and underdeveloped against the advanced technological states. Aside from questions of sovereignty and national esteem, there is concern whether third world countries would benefit from explorations conducted off their shores, even if the complex data gathered was handed over to them. By imposing a requirement of prior consent, coastal states could exact conditions of analysis and assessment so that they could share fully in any advantages of the knowledge gained.⁵¹

⁴⁷*Supra*, note 1.

⁴⁸In a speech before the United Nations Sea-Bed Committee on March 3, 1972, An Chih-yuan said of the superpowers that, "Under the guise of jointly exploiting sea-bed resources, they were sending out their so-called research ships and fishing vessels for brazen intrusion into the territorial seas of other countries and unbridled plunder of their undersea wealth and coastal fishing resources." *Supra*, n. 3. Later that month, Shen Wei-liang continued this attack on the United States and the Soviet Union, "... apart from large numbers of ocean-going fishing vessels, they have sent out what they call 'research vessels' to carry out activities everywhere and are stepping up the development of nuclear submarines and the establishment of various military installations, using the sea-bed for arms expansion and war preparation." "Refuting Superpowers' Sophistry at the Seabed and Ocean Floor Committee Meeting, March 24, 1972," 15 P.R. 13:17 (March 31, 1972).

⁴⁹"Second Session of UN Sea-Bed Committee in 1973 Concludes," NCNA-English, Geneva (Aug. 24, 1973) in S.C.M.P. 73-36:170 at 173.

⁵⁰U.N. Doc. A/AC. 138/SC. III/L. 42 (1973).

⁵¹See Stevenson and Oxman, *The Preparations for the Law of the Sea Conference*, 68 A.J.I.L. 1 (Jan. 1974) at 28-30.

High Seas

Freedom of the High Seas

The Chinese have generally supported the doctrine of freedom of the high seas. As the *People's Daily* informed its readers, "The high seas are that part of the ocean or sea the use of which is shared by all nations. On the high seas ships and nationals of all states are free to navigate, to fish, to hunt, and to engage in other maritime enterprises as well as to lay submarine cables. The principle of the freedom of the high seas has been recognized by international law and all nations."⁵² But there is another more recent strain of Chinese thinking on the subject. This was vividly expressed by Shen Wei-liang in a speech to the Second Subcommittee of the United Nations Sea-Bed Committee when he declared:

A small number of maritime powers have long dominated and run amuck on the seas and oceans by utilizing the so-called "freedom of the high seas." The "four freedoms" of the high seas [freedom of passage, freedom of fishing, freedom of laying and maintaining cables and pipelines, and freedom of flying over the high seas] are, in essence, freedoms of superpower aggression, threat and plunder against other countries, particularly the developing countries, and freedoms of superpower hegemony and power politics.⁵³

Approval or disapproval of the doctrine seems to depend on its perceived utility or disadvantage in each particular case. When the United States conducted nuclear tests in the Pacific⁵⁴ or proclaimed a combat zone off Vietnam,⁵⁵ the Chinese were loud in their condemnation and invocation of the principle of freedom of navigation on the high seas.

It is a fact that the Chinese have been expanding their maritime capability and may eventually find useful those aspects of the freedom of the high seas they now deplore. According to a recent article by John Dewenter, the Chinese Navy has a strength of 150,000 officers and men and 1200 vessels. They began to build their force with Soviet ships but now are constructing vessels of their own design in their own shipyards. The Chinese submarine fleet is the third largest in the world. In terms of personnel, the Navy as a whole is as large as that of Britain and France combined or that of Japan, Taiwan and South Korea combined.⁵⁶ Thus, the Chinese may in the future develop conflicting interests as they attempt to reconcile their role as champion of the third world against superpower maritime hegemony and their new status as a modest naval power wanting maximum freedom of movement for their ships.

⁵²Quoted in note 18, *supra*, at 64.

⁵³*Supra*, note 13 at 496.

⁵⁴*Supra*, note 52.

⁵⁵Observer, "Johnson Administration's Act of Piracy," J.M.J.P. (May 2, 1965) at 2, quoted in COHEN AND CHIU, note 2, *supra*, at 546.

⁵⁶*Supra*, note 24 at 743, 745.

Fishing on the High Seas

It is against this background that the Chinese submitted a rather bland working paper on general principles for the international sea area (hereinafter working paper II) to the Second Subcommittee of the United Nations Sea-Bed Committee. Paragraph 1 of the document declares, "The international sea area denotes all the sea and ocean space beyond the limits of national jurisdiction. The international sea area and its resources are, in principle, jointly owned by the people of all countries."⁵⁷ Since the "international sea area" does not appertain to the sea-bed and subsoil, it is somewhat unclear what "resources are, in principle, jointly owned by the people of all countries." Presumably, this refers to fish and other living things that move through the water. This would be a new idea, not one contained in either the Convention on the High Seas⁵⁸ or the Convention on Fishing and Conservation of the Living Resources of the High Seas⁵⁹ or in subsequent material on the subject. Joint ownership of the wealth of the high seas is almost certainly an impossible suggestion given present harvesting practices and current political realities.

In fact, the Chinese do not really go that far but opt instead for comprehensive regulation and conservation measures. As stated in Paragraph 6 of working paper II, "Fishing in the international sea area shall be properly regulated to prohibit indiscriminate fishing and other violations of rules and regulations for the conservation of fishery resources."⁶⁰ As thus phrased, the Chinese proposal would seem to be less a limitation on the fishing states and more a device to protect everyone's long term interests by guaranteeing adequate stocks.

One reason for this relative conservatism on the part of the Chinese is that they themselves have aspirations of substantially increasing their fishing capability. Toward this end they have organized their fishermen into communes, provided subsidies, established large markets and associated transportation, and have begun to modernize their fleet. While they cannot now compare with the technologically advanced fishing states, they do have the potential need and ability to develop in this area.⁶¹

Paragraph 6 of working paper II goes on to declare:

Pending the establishment of a unified international fishery organization, States of a given sea area may set up a regional committee to work out appropriate rules and regulations for the regulation of fishing and the conservation of marine living resources in the international sea area. Fishing vessels of States of other regions may

⁵⁷U.N. Doc. A/AC. 138/SC. II/L. 45 (1973); also found in the Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 1973, Vol. III, 28th Sess., Supp. no. 21 (A/9021) at 101.

⁵⁸U.N. Doc. A/CONF. 13/L. 53 and corr. 1 (1958).

⁵⁹U.N. Doc. A/CONF. 13/L. 54 and add. 1 (1958).

⁶⁰*Supra*, note 57.

⁶¹*Supra*, note 18 at 49-50.

enter the said region for fishing activities provided they comply with the relevant rules and regulations of the region.⁶²

The spirit of this provision is for the most part spelled out in detail in the Convention on Fishing and Conservation of the Living Resources of the High Seas, although the Geneva agreement does not apparently contemplate the eventual creation of a "unified international fishery organization." However, this proposed "unified international fishery organization" would appear to be something of a paper tiger since it actually seems designed to accommodate the competing interests of those involved in distant fishing rather than to reallocate the wealth derived from resources "jointly owned by the people of all countries." The whole scheme was quite obviously borrowed from the Declaration of Principles Governing the Sea Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, adopted by the General Assembly on December 17, 1970, which speaks of "the common heritage of mankind" (Paragraph 1) and an "international régime to be established" (Paragraph 4).⁶³ In sum, the Chinese move would appear to be merely a political gesture.

Non-Prejudicial Use

The rest of working paper II is quite conventional. Paragraph 3 states that, "Uses of the international sea area shall not prejudice the legitimate interests of other States and the common interests of all States."⁶⁴ This provision echoes the concluding sentence of Article 2 of the Convention on the High Seas which stipulates, "These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."⁶⁵ There is some difference of emphasis, however, between the two formulations. The Chinese draft first establishes the principle of non-prejudicial use and then goes on to describe the rights that may be enjoyed subject to this overriding condition. The Geneva Convention first spells out the freedoms and then requires that they be exercised responsibly.

Navigation and Overflight

Paragraph 4 of the Chinese working paper II goes on to declare: "Subject to the provisions of paragraph 3 above, ships and aircraft of all States have the right of navigation and overflight in the international sea area and in the air space thereabove, provided that they fly the flag or show the insignia of the State

⁶²*Supra*, note 57.

⁶³G.A. Res. 2749, 25 U.N. GAOR (1970).

⁶⁴*Supra*, note 57.

⁶⁵*Supra*, note 58.

to which they belong.”⁶⁶ By comparison, Article 2 of the Convention on the High Seas enumerates “freedom of navigation” and “freedom to fly over the high seas”⁶⁷ as two of the traditional four freedoms of the high seas. In addition, as we have seen, Article 2 contains a non-prejudicial use requirement which is similar in effect to Paragraph 3 of the Chinese draft which is mentioned. Finally, Articles 4, 5 and 6 of the Geneva Convention treat the matter of the flag in greater detail than this proviso in working paper II. In particular, the language of Article 5—“Ships have the nationality of the State whose flag they are entitled to fly. There must be a genuine link between the State and the ship . . .”⁶⁸—is at least as helpful as the Paragraph 4 condition that the flag or insignia be that of “the State to which they belong.”

Cables and Pipelines

Paragraph 5 of the Chinese draft says “Subject to the provisions of paragraph 3 above, all States have the right to lay cables and pipelines on the sea-bed of the international sea area.”⁶⁹ This is in no way different from the Convention on the High Seas which provides for, “Freedom to lay submarine cables and pipelines,”⁷⁰ coupled with the requirement of non-prejudicial use.

Land-Locked States

Finally, Paragraph 2 of working paper II declares:

In order to have access to and from the international sea area for trade and other peaceful purposes, land-locked States have the right to pass through the territory, territorial sea and other waters of adjacent coastal States. Coastal States and adjacent land-locked States shall, through consultations on the basis of equality and mutual respect for sovereignty, conclude bilateral or regional agreements on the relevant matters.⁷¹

Article 3 of the Convention on the High Seas mandates free access to the sea for land-locked states and the creation of agreements with coastal states for free transit to the sea as well as equal treatment for the ships of the land-locked states.⁷²

The Chinese Position in General

There would appear to be very little divergence between the formal Chinese position on the rights and privileges pertaining to the high seas and the

⁶⁶*Supra*, note 57.

⁶⁷*Supra*, note 58.

⁶⁸*Supra*, note 58.

⁶⁹*Supra*, note 57.

⁷⁰*Supra*, note 58.

⁷¹*Supra*, note 57.

⁷²*Supra*, note 58.

traditional four freedoms as codified in the Geneva Convention. The most significant difference lies in the fact that the Chinese would not insure the so-called "freedom of fishing."⁷³ Instead, as was shown, they claim to favor the principle of collective ownership over fish resources although their actual plan would be more regulatory than radical. One may conclude from all this that while the Chinese may denounce the superpowers for alleged abuses of the doctrine of freedom of the seas, they would not really alter its components.

Zones of Special Jurisdiction

Economic Zones

The Chinese favor the creation of certain zones of special jurisdiction in the area beyond the territorial sea. The most important of these are economic zones, particularly for the protection of coastal state fishing. The Chinese have argued long and forcefully that the underdeveloped countries require exclusive rights to harvest the waters extending out some distance from their shores. As Chen Chih-fang pointed out at a meeting of the United Nations Sea-Bed Committee in July 1972:

Sea fish resources are an important component of the natural resources of coastal states. And the shallow sea waters along the coasts are important places for the main sea fishes to spawn, feed and hibernate. At present, more than 80 percent of the world's total catch is made in the shallow sea waters, which comprise only 7.8 percent of the total sea area on the globe.

He went on to charge:

The domination of the few distant fishing powers over the seas and their reckless plunder of fishery resources in the shallow sea waters of other coastal states have already caused tremendous damage and posed a serious threat to the economic interests and state sovereignty of many coastal states, particularly those in Asia, Africa and Latin America.⁷⁴

As a result, the Chinese have placed themselves firmly by the side of those countries which have claimed special jurisdiction over areas beyond the territorial seas. Shen Wei-liang declared in July 1973: "The Chinese Government has consistently supported the just struggle of the developing countries in defense of their maritime rights and firmly supported their reasonable proposition for an exclusive economic zone not exceeding 200 nautical miles."⁷⁵ (Note should just be taken of the 200 mile limitation and the fact that measurement is made from the base-line of the territorial sea.) The

⁷³*Id.*, art. 2.

⁷⁴"Chinese Representative Speaks at UN Sea-Bed Committee Meeting," NCNA-English, Geneva (July 21, 1972) in S.C.M.P. 72-31:134.

⁷⁵*Supra*, note 4. The Chinese also point to other sources of support, such as that given by the Organization for African Unity to back up their own stand on the question of exclusive economic zones. See note 15, *supra*, at 19.

Chinese not only give their full backing to the underdeveloped countries but also seek to identify with them and to assert a leadership role. As Chen Chih-fang said in his July 1972 speech to the United Nations Sea-Bed Committee:

The Chinese people have become keenly aware through their long practice of revolutionary struggles that the independence of a country is incomplete without economic independence. Opposition to economic plunder and protection of national fishery resources by the developing countries are the inalienable sovereign rights of independent states.⁷⁶

In this connection, the Chinese naturally never let pass an opportunity to revile the United States and the Soviet Union for their opposition to the claims made by the third world states for extended economic jurisdiction over the waters contiguous to their territorial seas. They have violently denounced the superpowers for hegemonism and plunder of resources⁷⁷ and for deceit.⁷⁸

The Chinese themselves have established a special fishing zone stretching from the Sino-Korean border to Chekiang Province and extending out beyond the 12 nautical mile territorial sea claimed by the Chinese Government. No trawler fishing at all is allowed in designated areas, either by Chinese or foreign boats.⁷⁹ The prohibition has been respected by the Japanese in a series of agreements concluded between the fishery associations of the two countries.⁸⁰

The Chinese have submitted their own proposals regarding exclusive economic zones to the Second Subcommittee of the United Nations Sea-Bed Committee. In Paragraph 2(1) of working paper I they declare:

A coastal state may reasonably define an exclusive economic zone (hereinafter referred to as the economic zone) beyond and adjacent to its territorial sea in accordance with its geographical and geological conditions, the state of its natural resources and its needs of national economic development. The outer limit of the economic zone may

⁷⁶*Supra*, note 74 at 136.

⁷⁷"In the contemporary world, the superpowers, for the purpose of contending for hegemony over seas and oceans and plundering the offshore resources of other countries, have tried in every way to place unreasonable restraints on the limits of jurisdiction of other coastal states, thus causing serious threat and injury to the security and the interests of national economy of these countries, especially the developing countries." *Supra*, note 4. "Why are the superpowers so violently opposed to the position of the small and medium-sized countries for enlarging the territorial sea and the zone of jurisdiction? It is not difficult to see the underlying motive if only one takes a look at the contention between the United States and the Soviet Union for maritime hegemony in the Mediterranean, the Persian Gulf, the Indian Ocean, the Caribbean, the Pacific and the Atlantic Ocean and their rivalry in setting up bases and plundering the fishing and sea bed resources there. When the territorial sea and the zone of jurisdiction are enlarged, their 'private sea' over which they act the overlords will contract." *Supra*, note 15.

⁷⁸"The U.S. representative set forth a proposal of so-called "coastal sea-bed economic area" in an attempt to replace the exclusive economic zone proposed by the developing countries with continental shelf. The Soviet representative peddled the deceptive "preferential rights" for coastal countries." *Supra*, note 49.

⁷⁹*Supra*, note 18 at 65-66; note 17 at 111; LEE, CHINA AND INTERNATIONAL AGREEMENTS 58-61 (1969).

⁸⁰See JOHNSTON & CHIU, AGREEMENTS OF THE PEOPLE'S REPUBLIC OF CHINA, 1949-67: A CALENDAR (1968).

not, in maximum, exceed 200 nautical miles measured from the baseline of the territorial sea.⁸¹

Paragraph 2(9) states:

The above provisions [which will be examined below] relating to the economic zone shall also apply to the exclusive fishery zone as reasonably defined by a coastal State beyond its territorial sea, except that the resources in the exclusive fishery zone are confined to the living resources of the water column in the said fishery zone.⁸²

Thus, the Chinese draft would accord the coastal state the choice of whether to establish an economic zone with complete sovereignty over the living and non-living resources of the water column, sea-bed and subsoil⁸³ or a fishery zone in which only exclusive rights to the living resources of the water column would be reserved. In either case, the state creating a zone would be expected to act reasonably, justify its claim by reference to particular conditions and needs and limit itself to 200 nautical miles.

Working paper II goes on to provide a set of rules governing activities in the zone. Normal navigation and overflight is allowed. The laying of cables and pipelines would require the consent of the coastal state, Paragraph 2(4).⁸⁴ Other states could fish, mine or engage in other activities in the zone by agreement with the coastal state, Paragraph 2(5).⁸⁵ Other states using the zone would have to comply with the laws and regulations enacted by the coastal state, Paragraph 2(6).⁸⁶ The coastal state could enforce its laws and regulations against violators, though it is not specified what measures would be authorized, Paragraph 2(7).⁸⁷ The boundaries between the economic zones of countries opposite or adjacent to each other should be determined by consultations. There is no provision for equidistance in the absence of agreement, Paragraph 2(8).⁸⁸

⁸¹*Supra*, note 1.

⁸²*Id.*

⁸³"All natural resources within the economic zone of a coastal State, including living and non-living resources of the whole water column, sea-bed and its subsoil, are owned by the coastal State. A coastal State exercises exclusive jurisdiction over its economic zone for the purpose of protecting, using, exploring and exploiting the resources as described in the preceding paragraph." *Id.*

⁸⁴"The normal navigation and overflight on the water surface of, and in the air space above, the economic zone by ships and aircraft of all States shall not be prejudiced. The delineation of the course for laying cables and pipelines in the sea-bed of the economic zone is subject to the consent of the coastal State." *Id.*

⁸⁵"Other States may engage in fishery, mining or other activities in the economic zone of a coastal State pursuant to agreement reached with the coastal State." *Id.*

⁸⁶"A coastal State may enact necessary laws and regulations for the effective regulation of its economic zone. Other States, in carrying out any activities in the economic zone of a coastal State, are required to observe the relevant laws and regulations of the coastal State." *Id.*

⁸⁷"A coastal State is entitled, when necessary, to deal with unauthorized fishery, mining or other activities in its economic zone and with violations of its relevant laws and regulations even though permission for such activities has been given." *Id.*

⁸⁸"The delimitation of boundaries between the economic zones of coastal States adjacent or opposite to each other shall be jointly determined through consultation on an equal footing. Coastal States adjacent or opposite to each other shall, on the basis of safeguarding and respecting the

Finally, the Chinese do have an interesting proposal regarding the rights of others in a coastal state's economic zone. Paragraph 2(3) of working paper I suggests:

A coastal State shall, in principle, grant to the land-locked and shelf-locked States adjacent to its territory common enjoyment of a certain proportion of the rights of ownership in its economic zone. The coastal State and its adjacent land-locked and shelf-locked States shall, through consultations on the basis of equality and mutual respect for sovereignty, conclude bilateral or regional agreements on the relevant matters.⁸⁹

The concrete effect of the adoption of this proposal is obvious. The distant fish and other wealth harvesting powers could be banned from the rich economic zones of the rest of the world. On the other hand, the land-locked and shelf-locked countries, which have certainly not been voracious plunderers of ocean wealth, would be given special rights in those economic zones. Thus, the Chinese plan would tend to accomplish a conservation goal by giving the coastal states the right to manage the waters up to 200 miles off their shores. And it would definitely accomplish the political objective of restraining and isolating the advanced technological powers.

Security Zones

Another exercise of special jurisdiction in the area beyond the territorial sea is the security zone. The original Chinese view of this concept was framed by Fu Chu, "In order to meet the needs of national defense and security, the coastal state can delimit a particular area within its own territorial sea as a prohibited zone, refusing passage through it to all vessels. . . ."⁹⁰ In other words, it is a part of the territorial sea in which there is not a right of innocent passage even for merchantmen. In practice however the Chinese have designated three areas which are apparently on the high seas beyond their 12-mile territorial limit as security zones (under differing names) in which foreign ships are either completely banned, required to request permission, or advised to avoid.⁹¹ The factor which distinguishes their zones from that established by the Americans off Vietnam which drew so much protest⁹² is that the Chinese areas are contiguous to the state's territorial seas and are designed for defense of the homeland rather than protection of a faraway military operation. Still, there is a real question whether their security zones are an infringement of the doctrine of the freedom of the high seas as the Chinese themselves have interpreted it.

sovereignty of each other, conduct necessary consultations to work out reasonable solutions for the exploitation, regulation and other matters relating to the natural resources in the contiguous parts of their economic zones." *Id.*

⁸⁹*Id.*

⁹⁰Fu Chu in COHEN AND CHIU, *supra* note 2 at 533.

⁹¹Note 18, *supra*, at 64-65; note 17, *supra*, at 113-114.

⁹²See note 55, *supra*.

Peace Zones

Closely related to security zones are so-called "zones of peace," which are areas that would be free of all military activity by outside powers. While no such areas have yet been established in fact, there were efforts made in the United Nations to designate the Indian Ocean as a zone of Peace. The most recent resolution to this effect was passed by the General Assembly in 1971. The Chinese Government expressed strong support for the proposal. In truth, they felt it coincided with their political interest of supporting Pakistan in its confrontation with India.⁹³ However, nothing has come of the idea.⁹⁴

Pollution Zones

The Chinese Government also supports the notion that a coastal state is entitled to assert limited jurisdiction over a portion of the high seas beyond territorial waters for the purpose of dealing with pollution. As Chen Chih-fang declared to the Second Subcommittee of the United Nations Sea-Bed Committee on August 2, 1973:

We think that coastal states, being the direct victims of marine pollution, have the full right as well as necessity to exercise direct jurisdiction and control over areas within given limits, which are adjacent to their territorial seas, in order to protect the health and security of their people and meet the needs of their economic development.⁹⁵

The key unanswered question of course is just how far this zone should extend. The Chinese have not yet given substance to the controlling phrase "within given limits."

Customs Zones

Finally, it should be mentioned that the Chinese approve of the creation of special customs zones for the enforcement of trading regulations.⁹⁶

⁹³"In his speech to the First Committee of the General Assembly, "Chen Chu pointed out that at present the peace in the Indian Ocean is being seriously undermined. With the abetment and support of the Soviet Union, India has launched a large scale armed aggression against Pakistan. Such flagrant acts of aggression must be severely condemned. He pointed out that India is hypocritically assuming "peace-loving" gestures and it is essential to tear away India's mask. He further pointed out that the Soviet Union, the United States, Britain and India must undertake obligations." "Chen Chu Expounds China's Principled Stand in Supporting 'Declaration of Indian Ocean as Peace Zone,' " NCNA-English, UN (Dec. 10, 1971) in S.C.M.P. 71-51:116.

⁹⁴The following year, Chen Chu again spoke on the subject. "As a result of the Indian aggression against Pakistan last year with the support of the Soviet Union and the continued non-implementation of the relevant resolutions of the U.N. General Assembly and the Security Council, the South-Asian sub-continent is not tranquil either. One superpower takes the Indian Ocean as its important strategic base, where its fleet is plying hither and thither with no intention to quit. The other superpower, following the steps of the former, has in recent years actively carried out military expansion and established military bases in the Indian Ocean zone in contention for spheres of influence." "Chen Chu Supports Just Proposal of Declaring Indian Ocean a Zone of Peace," NCNA-English, UN (Dec. 5, 1972) in S.C.M.P. 72-50:184 at 184-5.

⁹⁵"On Prevention and Control of Marine Pollution," 15 P.R. 34:12 (Aug. 25, 1972).

⁹⁶Note 18, *supra*, at 67.

Continental Shelf

General Principles

The Chinese Government expressed its general attitude on the matter of the continental shelf when An Chi-yuan delivered his first speech to the United Nations Sea-Bed Committee on March 3, 1972: "We maintain that all coastal countries have the right of disposal of their natural resources in their coastal seas, sea-bed, and the subsoil thereof so as to promote the well-being of their people and the development of their national economic interests."⁹⁷

Breadth

The Chinese went on to elaborate their position on the continental shelf in working paper I submitted to the Second Subcommittee of the United Nations Sea-Bed Committee in 1973. Paragraph 3(1) provides that:

By virtue of the principle that the continental shelf is the natural prolongation of the continental territory, a coastal state may reasonably define, according to its specific geographical conditions, the limits of the continental shelf under its exclusive jurisdiction beyond its territorial sea or economic zone. The maximum limits of such continental shelf may be determined among States through consultations.⁹⁸

As usual, the Chinese would allow a coastal state to exercise its sovereign discretion in setting reasonable limits on its continental shelf. They recognize that some maximum limits are necessary and imply that they may be greater than the 200 nautical mile extension of the territorial sea or economic zone. However, they do not say how these maximum limits are to be determined, whether by distance from shore or by a rule of exploitability,⁹⁹ and suggest only that there be discussions to arrive at a solution.

Ownership of Resources

The Chinese draft goes on to say in Paragraph 3(2) that "The natural resources of the continental shelf, including the mineral resources of the sea-bed and subsoil and the living resources of sedentary species, appertain to the coastal State."¹⁰⁰ This description of the resources at issue is congruent with

⁹⁷*Supra*, note 3.

⁹⁸*Supra*, note 1.

⁹⁹*Cf.* Art. 1 of the Convention on the Continental Shelf on April 26, 1958. U.N. Doc. A/CONF. 13/L. 55 (1955). "For the purpose of these articles, the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

¹⁰⁰*Supra*, note 1.

that contained in the Convention on the Continental Shelf¹⁰¹ and with common usage.

Navigation and Overflight

Paragraph 3(3) of working paper I states that:

The superjacent waters of the continental shelf beyond the territorial sea, the economic zone or the fishery zone are not subject to the jurisdiction of the coastal State. The normal navigation and overflight on the superjacent waters of the continental shelf and in the air space thereabove by ships and aircraft of all states shall not be prejudiced.¹⁰²

Again, this is very similar to the corresponding provision of the Geneva Convention¹⁰³ and is generally agreed upon.

Cables and Pipelines

The next provision of the Chinese draft differs somewhat in emphasis from the Geneva Convention. Paragraph 3(4) declares: "A coastal State may enact all necessary laws and regulations for the effective management of its continental shelf. The delineation of the course for laying submarine cables and pipelines on the continental shelf by a foreign state is subject to the consent of the coastal State."¹⁰⁴ This seems to grant the coastal state absolute discretion about whether to allow others to lay cables or pipelines. At the very least, it gives the coastal state the right to decide where such cables and pipelines are to run. The Geneva Convention, on the other hand, accentuates non-interference by the coastal state in such activities. Article 4 provides: "Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal state may not impede the laying or maintenance of submarine cables or pipelines on the continental shelf."¹⁰⁵ Thus, whereas the Chinese proposal emphasizes the rights of the coastal state, the Geneva Convention emphasizes the rights of others.

Shelf Boundaries

The Chinese draft concludes its exposition of the principles that ought to govern the continental shelf by stipulating that states whose continental shelves

¹⁰¹Art. 2(1) declares, "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." And Article 2(4) goes on to say, "The natural resources referred to in these articles consist of the mineral and non-living resources of the sea-bed and subsoil together with the living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil." *Supra*, note 99.

¹⁰²*Supra*, note 1.

¹⁰³Art. 3 reads, "The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters." *Supra*, note 99.

¹⁰⁴*Id.*

¹⁰⁵*Supra*, note 1.

are opposite or adjacent and connect together should delimit their respective jurisdictions by agreement.¹⁰⁶ The Geneva Convention also calls on states to settle their boundaries by negotiation but provides that in the absence of agreement or special circumstances, the rule of equidistance will apply.¹⁰⁷

The Chinese Claim

The Chinese themselves have asserted sovereign rights over the continental shelf but have never actually defined the limits of their claim. They do however vigorously condemn what they consider to be intrusions upon their continental shelf by the Japanese and Koreans in the East China Sea and the Yellow Sea. The issue is complicated by the unsettled legal status of Taiwan and various small islands of disputed ownership. In a Jen-min Jih-pao article appearing on December 29, 1970, *Commentator* noted that "the Japanese reactionaries, ganging up with the Chiang Kai-shek bandit gang and the Pak Jung Hi clique, are stepping up their scheme to plunder, together with U.S. imperialism, the sea-bed and subsoil resources to China and Korea."¹⁰⁸ After denouncing the joint development plans undertaken by Japan, Korea and Taiwan, he declared:

Taiwan Province and the islands appertaining thereto, including the Tiaoyu, Huangwei, Chihwei, Nanhsiao, Peihshiao and other islands, are China's sacred territories. The resources of the sea-bed and subsoil of the seas around these islands and of the shallow seas adjacent to other parts of China all belong to China, their owner, and we will never permit others to lay their hands on them.¹⁰⁹

He then went on to warn those dealing with the Taiwan Government:

All agreements and contracts concerning the exploration and exploitation of China's sea-bed and subsoil resources that gang concluded with any country, any international organization or any foreign public or private enterprise under the signboard of "joint development" or anything else are illegal and null and void.¹¹⁰

¹⁰⁶Art. 3(5) says, "States adjacent or opposite to each other, the continental shelves of which connect together, shall jointly determine the delimitation of the limits of jurisdiction of the continental shelves through consultations on an equal footing." Article 3(6) goes on to declare, "States adjacent or opposite to each other, the continental shelves of which connect together shall, on the basis of safeguarding and respecting the sovereignty of each other, conduct necessary consultations to work out reasonable solutions for the exploitation, regulation and other matters relating to the natural resources in their contiguous parts of the continental shelves." *Supra*, note 99.

¹⁰⁷In both art. 6(1), which deals with adjacent continental shelves, and art. 6(2) which deals with opposite continental shelves, there is language to the effect that in the absence of agreement and unless special circumstances prevail, the boundary line is to be determined by resort to the principle of equidistance. *Supra*, note 99.

¹⁰⁸*Commentator*, "On China's Seabed and Subsoil Resources," J.M.J.P. (Dec. 29, 1970) quoted in CHAI, ED., *THE FOREIGN RELATIONS OF THE PEOPLE'S REPUBLIC OF CHINA* 324-5 (1972).

¹⁰⁹*Id.*, 325.

¹¹⁰*Id.*; see also, *Commentator*, "China's Territory and Sovereignty Brook No Encroachment," NCNA-English, Peking (May 1, 1971) in S.C.M.P. 71-19:159.

The Chinese have since reaffirmed that position in the United Nations.¹¹¹ Thus, it appears that the Chinese are not exercised because the Japanese or Koreans have made any claims which encroach upon the shelf near the China mainland. Instead, they are angry that joint development agreements have been concluded with the Nationalists which they feel give away their rights to the shelf around the Chinese province of Taiwan without permission of the sole legitimate Government in Peking.

The lively Chinese interest in the continental shelf is due to the fact that the exploratory reports indicate the possibility of large oil reserves in the subsoil beneath the East China Sea and the Yellow Sea.¹¹² While China is self-sufficient in oil at the present time, it views the prospect of off-shore wells as a potential income producer and source of fuel for an expanding economy.

The reason that the Tiao-yu-t'ai Islands are so important is that ownership of the group will have a significant effect on the delimitation of the continental shelf with Japan and the consequent division of the wealth. The Chinese (and the Nationalist Government on Taiwan) advance a number of arguments in support of their assertion of sovereignty. First, they point out that geologically the islands are situated on the continental shelf which is contiguous to the China mainland and Taiwan whereas they are separated from the Ryukyus by the Okinawa Trough which is more than 2000 meters deep. Second, although the islands are uninhabited, they have traditionally been used by Chinese fishermen. Third, the earliest writings which mention the islands refer to them as part of China rather than the Ryukyus. Fourth, the Chinese reason that when Taiwan and the smaller islands associated with it were ceded to Japan as a result of the 1895 treaty ending the Sino-Japanese War, the Tiao-yu-t'ai chain was also transferred. Therefore, when Japan surrendered to the Allies in 1945 and agreed to the return of all Chinese territories, this included the Tiao-yu-t'ai Islands.¹¹³

It is obvious that there cannot be a final determination of the continental shelf boundary in the areas of the East China Sea and the Yellow Sea until the status of Taiwan is settled and the ownership of the Tiao-yu-t'ai and other groups is resolved. But until those political issues are negotiated, the Chinese

¹¹¹In his speech before the United Nations Sea-Bed Committee on March 3, 1972, An Chin-yuan used very similar language in stating:

China's Taiwan Province and all the islands appertaining to it, including Tiaoyu Island, Huangwei Island, Chihwei Island, Nanhsiao Island, Peihshiao Island, etc. are part of China's sacred territory. The sea-bed resources of the seas around these islands and of the shallow seas adjacent to other parts of China belong completely to China and it is absolutely impermissible for any foreign aggressor to poke his fingers into them. No one whosoever is allowed to create any pretext to carve off China's territory and plunder the sea resources belonging to China. And no one will ever succeed in doing so. *Supra*, note 3.

¹¹²See generally Choon-Ho Park, *Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy*, 14 HARV. INT'L. L. J. 212 (1973).

¹¹³*Id.* at 253.

can be expected to do everything necessary to preserve their claims and to work for acceptance of the principles formulated in working paper I.

Sea-Bed

International Régime

The Chinese position on the sea-bed is dictated by a belief that its resources are "commonly owned by all the peoples in the world"¹¹⁴ and that domination by the superpowers must be relentlessly opposed. In working paper II, Paragraph 7 provides that "The exploration, exploitation and all other activities conducted in the sea-bed, ocean floor and the subsoil of the international sea area shall be governed by the international régime and the international machinery to be established."¹¹⁵ They of course assert that this international régime must be especially responsive to the interests of the developing countries.¹¹⁶

General Assembly Declaration of Principles Governing the Sea-Bed

While the foregoing propositions are in accord with General Assembly Resolution 2749 (XXV) adopted on December 17, 1970, there are a number of matters which the Chinese want to be made more explicit. First, the Declaration does not specify what resources are to be covered by the international régime. The Chinese believe it is appropriate to include living resources in the scope of its control.¹¹⁷ Second, the competence of the international régime as set out in the Declaration appears limited to governing the exploration and exploitation of the sea-bed. The Chinese, however, wish to maximize the role of the international régime in order better to serve the needs of the developing countries and curtail the activities of the superpowers.¹¹⁸ But they have not actually specified what additional areas should be involved. Third, while the Declaration enumerates three ways in which the "States shall promote international co-operation in scientific research exclusively for peaceful purposes,"¹¹⁹ the Chinese argue that:

¹¹⁴*Supra*, note 3. Cf. Declaration of Principles, *supra* note 63, ¶1, "The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind."

¹¹⁵*Supra*, note 57. Cf., Declaration of Principles, *supra* note 63, ¶4, "All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international régime to be established."

¹¹⁶*Supra*, note 49 at 173. Cf., Declaration of Principles, *supra* note 63, ¶7, "The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether landlocked or coastal, and taking into particular consideration the interests and needs of the developing countries." See also ¶9, *id.*

¹¹⁷"Chinese Representative [Hsia Pu] to UN Sea-Bed Committee Speaks at Sub-Committee Meeting," NCNA-English, Geneva (July 27, 1972) in S.C.M.P. 72-32:85 at 86.

¹¹⁸*Id.* at 86-7.

¹¹⁹*Supra*, note 63, ¶10.

Marine scientific research in the international seas should be conducted under the control of the relevant international systems and machinery. Such control is not for obstructing marine scientific research or restricting scientific activities, but for preventing a handful of hegemonic powers from dominating marine scientific research, and for preventing the superpowers from unlawfully occupying international sea-bed area and resources.¹²⁰

In other words, they would vest responsibility for the conduct of deep sea research in the international organization that would be set up rather than in the states in order to prevent domination by the technologically advanced superpowers. Whether this would be accomplished through mixed crews or some type of contractual arrangement is not spelled out.

There is one issue on which the Chinese are in frank disagreement with the General Assembly resolution. They believe that the effect of Paragraph 8 of the Declaration which mandates peaceful use and the exclusion of nuclear weapons from the sea-bed¹²¹ is to protect and perpetuate the military advantage of the United States and the Soviet Union. As Hsia Pu argued before the Second Subcommittee of the United Nations Sea-Bed Committee:

Some people have proposed to include the question of the prohibition of nuclear tests and the emplacement of nuclear weapons in the sea-bed area into the international régime . . . to advocate prohibition of nuclear tests in the international sea-bed is in effect designed to enable the two superpowers to continue monopolizing nuclear weapons, control other countries and tie the hands of peace-loving countries.¹²²

He did go on to state, however, that if nuclear powered submarines (presumably missile carrying) were banned from the high seas and the territorial seas of other countries, then the Chinese would support the prohibition on the emplacement of nuclear and other weapons from the deep sea-bed and the continental shelf areas under national jurisdiction.

Commercial Exploitation

China was one of the sponsors of a resolution submitted to the United Nations Sea-Bed Committee which reaffirmed a similar General Assembly resolution of 1969 (2574 D XXIV) and called upon all states "to cease and desist from all activities aiming at commercial exploitation in the sea-bed area and to refrain from engaging directly or through their nationals in any operations aimed at the

¹²⁰*Supra*, note 49 at 173.

¹²¹"The area shall be reserved exclusively for peaceful purposes without prejudice to any measures which have been or may be agreed upon in the context of international negotiations undertaken in the field of disarmament and which may be applicable to a broader area. One or more international agreements shall be concluded as soon as possible in order to implement effectively this principle and to constitute a step towards the exclusion of the sea-bed, the ocean floor and the subsoil thereof from the arms race." *Supra*, note 63.

¹²²U.N. Doc. A/AC. 138/L. 11/Rev. 1 (1972); also found in the Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 1972, 27th Sess., Supp. no. 21 (A/8721) at 69.

exploitation of the area before the establishment of the international regime."¹²³ This was obviously another effort to restrict the freedom and advantage of the technologically advanced states and to preserve the rights and potential benefits of the developing countries.

Prospects

As the previous paragraphs reveal, the Chinese have devoted much less attention to the regulation of the sea-bed than to other areas of the law of the sea. This is doubtless due to the fact that the issues involved are less pressing than such needs as coastal security, the preservation of exclusive fisheries and the exploitation of continental shelf resources. But the Chinese certainly recognize the long term importance of the régime that will be adopted to dispose of the great wealth of the ocean bottom. And they can be expected to give greater time and effort to this matter.

Concluding Note

In order to understand the motivation and direction of Chinese policy on the law of the sea, it is necessary to examine the various roles played by the Chinese Government in the international arena, each of which is an element in the formulation of its overall attitude.

Third World Leadership

By far the most important factor to be considered is the desire of the Chinese Government to lead the third world. The Chinese make every effort to identify themselves with the developing countries and to stress their common historical and contemporary situation.¹²⁴ They of course give unstinting support to the desires voiced by these weak and poor states for broadened territorial seas and areas of exclusive maritime jurisdiction.¹²⁵ Coupled with this are bitter attacks

¹²³Cohen, *Chinese Attitudes Toward International Law—And Our Own*, PROC. AM. SOC. INT'L. L., April 27-29, 1967 at 116.

¹²⁴As An Chih-yuan stressed in his speech to the Sea-Bed Committee on March 3, 1972, "China shared the common lot and faces the common historical tasks as the great majority of the countries of Asia, Africa and Latin America." *Supra*, note 3.

¹²⁵"The Chinese people regard the struggle of the Latin American countries and people against U.S. imperialist aggression as their own struggle. They express firm support for the Latin American countries and people in their struggle against U.S. imperialist aggression and in defense of the rights of territorial seas." "Support Latin American Countries Struggling to Defend Their Territorial Sea Right," J.M.J.P. (Nov. 20, 1970) in CHAI, n. 108, *supra*, at 207. "China firmly supported the just struggle undertaken by the Latin American countries in defense of the 200-mile limit of their territorial waters and their own marine resources and resolutely opposed the maritime hegemony and power politics of the Super-Powers." *Supra*, note 3. "We will, as always, firmly stand by the developing countries and all the justice upholding countries to work for a fair and reasonable settlement of the question of the rights over the seas and oceans." *Supra*, note 12. See also "Peruvian Minister of Fisheries Visits China," 14 P.R. 26:4 (June 25, 1971); "Joint Communiqué on Establishment of Diplomatic Relations between China and Peru," 14 P.R. 45:5 (Nov. 5, 1971); "Diplomatic Relations Established between China and Argentina," 15 P.R. 7:26 (Feb. 25, 1972).

on the Soviet Union and the United States which are pictured as the superpower adversaries of the rest of the world trying to plunder the resources belonging to other countries and to exploit a disproportionate share of the wealth owned in common. Issues involved in the law of the sea have been an extremely useful vehicle for Chinese political purposes. On most matters their interests are congruent with those of the developing countries and they can comfortably and consistently oppose the maritime powers which have very different needs, objectives and capabilities.

Great Power Status

On the other hand, China is an aspiring great power with substantial military and commercial potential on the seas. This sets it off from its third world colleagues and creates the possibility of long term convergence of interests with the superpowers it now so vigorously condemns. The Chinese Government must therefore maintain a delicate balance between the immediate political advantages it gains by siding with the underdeveloped countries and the future opportunities it could enjoy as a maritime state. Thus, while the Chinese denounce the superpowers for their abuses, they still give nominal support to such principles as the freedom of the high seas which might eventually prove useful.

Chinese Nationalism

Another factor that plays a part is the particularly Chinese element of the complex. The present Government is the inheritor of a long social and political history. Vivid in the mind if not the memory of the leaders and the people is the proud tradition of the Middle Kingdom and the complete humiliation it suffered at the hands of the Western powers and Japan. It is not difficult to appreciate why they would oppose these states almost instinctively on any issue. The problems relating to the sea provide still another opportunity for the Chinese to give vent to their mistrust and antagonism. Their extreme suspicion of the motives of others is an important characteristic that must be taken into account.

Communism

Finally, and of least importance in the equation of Government policy, is the fact that the Chinese claim to be a Communist society and to be the guardians of Marxism-Leninism. However, little socialist philosophy is evident in their statements and conduct.¹²⁶ If there is an ideological component at all in the Chinese position on law of the sea issues, it is the world view of the developing countries

¹²⁶Goldie, *Rich and Poor Countries and the Limits of Ideology*, 1 SYRACUSE J. INT'L. L. COMMERCE 92 (Oct. 1972) at 102.

regardless of their particular mode of internal organization or international alignment. Marxism-Leninism is used only as another club with which to beat the Russians; it is not used as a guide for thought and action.

While the Chinese Government has articulated its views on a number of subjects involving the oceans, its proposals as yet lack specificity. Chinese attitudes and practices are still in the process of formation. The only certain conclusion which can be made is that they can be expected to increase their interest and involvement in this area of law and politics.